

**TO: Honorable Anthony J. Scirica, Chair
 Standing Committee on Rules of Practice
 and Procedure**

**FROM: Honorable Milton I. Shadur, Chair
 Advisory Committee on Evidence Rules**

DATE: May 1, 2002

**RE: Report of the Advisory Committee on Evidence
 Rules**

I. Introduction

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The Evidence Rules Committee also unanimously agreed to revise a proposed amendment to Evidence Rule 804(b)(3) that was released for public comment. Part II of this Report summarizes the discussion of the proposed amendment as released for public comment and its proposed revision. The Evidence Rules Committee unanimously recommends that the revised proposal to amend Rule 804(b)(3) be released for a new round of public comment.

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II. Action Items

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B. Recommendation To Approve the Revised Proposed Amendment to Evidence Rule 804(b)(3) For Release For Public Comment

At its June 2001 meeting the Standing Committee approved the publication of a proposed amendment to Evidence Rule 804(b)(3). This amendment would require every proponent of a declaration against penal interest to establish corroborating circumstances clearly indicating the trustworthiness of the hearsay statement. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest; but by its terms the Rule imposes no similar requirement on the prosecution. Nor does the Rule require a showing of corroborating circumstances in civil cases. The most important goal of the proposed amendment as released for public comment was to provide equal treatment to the accused and the prosecution in a criminal case.

After reviewing the public comment – particularly the comment filed by the Department of Justice – a majority of the Evidence Rules Committee determined that the proposal released for public comment would create substantial problems of application in criminal cases where declarations against penal interest are offered by the prosecution. This is because most courts have held that “corroborating circumstances” can or must be shown by reference to independent corroborating evidence indicating that the declarant’s statement is true. But this definition of corroborating circumstances – including a component of corroborating evidence – is problematic if applied to government-proffered hearsay statements because of the

decision in *Lilly v. Virginia*, 527 U.S. 116 (1999). In *Lilly* the Court declared that the hearsay exception for declarations against penal interest is not “firmly rooted” and therefore the Confrontation Clause is not satisfied simply because a hearsay statement fits within that exception. Therefore, to admit a declaration against penal interest consistently with the Confrontation Clause after *Lilly*, the government is required to show that the statement carries “particularized guarantees of trustworthiness” that indicate it is reliable. And the Court in *Lilly* held that this showing of “particularized guarantees of trustworthiness” cannot be met by a showing of independent corroborating evidence. Rather, the statement must be shown reliable due to the circumstances under which it is made.

Consequently, the proposed amendment’s requirement of “symmetry” in applying the corroborating circumstances requirement to statements offered by the prosecution could end up in requiring the government to satisfy an evidentiary standard that is either more stringent than that required by the Constitution or different from that required by the Constitution. The government might have to provide independent corroborating evidence that the declaration against penal interest is true, even though the Confrontation Clause imposes no such requirement. The risk of confusion and undue burden in applying different evidentiary and constitutional standards to the same piece of evidence is profound. For this reason, a majority of the Evidence Rules Committee voted to withdraw the proposed amendment to Rule 804(b)(3) as it was released for public comment.

Despite voting to withdraw the proposed amendment, the Committee determined that the existing Rule presents a number of problems, the most important being that it does not comport with the Constitution in a criminal case. This is because after *Lilly*, Rule 804(b)(3) is not a firmly-rooted hearsay exception, so the mere fact

that a statement falls within the exception does not satisfy the Confrontation Clause. *Lilly* holds that a statement offered under a hearsay exception that is not firmly-rooted will satisfy the Confrontation Clause only when it bears “particularized guarantees of trustworthiness.” And the *Lilly* Court held that this standard of “particularized guarantees” would not be satisfied simply because the statement was disserving to the declarant’s penal interest. To satisfy the Confrontation Clause, the government must show circumstantial guarantees of trustworthiness beyond the fact that the statement is disserving. Yet Rule 804(b)(3) as written requires only that the prosecution show that the statement is disserving to the declarant’s penal interest. It does not impose any additional evidentiary requirement. Thus, after *Lilly*, Rule 804(b)(3) as written is not consistent with constitutional standards. To the Committee’s knowledge, no other categorical hearsay exception has the potential of being applied in such a way that a statement could fit within the exception and yet would violate the accused’s right to confrontation. Other categorical hearsay exceptions, such as those for dying declarations, excited utterances and business records, have been found firmly-rooted.

The Committee found it notable that courts have struggled mightily to read Evidence Rules as if their text were consistent with the Constitution. Courts are understandably uncomfortable with having Evidence Rules that could be unconstitutional as applied. One example is the cases construing Rules 413-415. Courts have gone a long way to read those Rules as incorporating a Rule 403 balancing test, even though that is not evident from the text of those Rules. The rationale for that construction is that otherwise the Rules would violate the due process rights of a defendant charged with a sex crime. Another example of a non-textual construction found necessary due to the constitutional infirmity of the text of the Rule is Rule 804(b)(3) itself. The leading case on the subject, *United States*

v. Alvarez, 584 F.2d 694 (5th Cir. 1978), construed Rule 804(b)(3) as requiring corroborating circumstances for inculpatory statements against penal interest even though the text does not abide that construction. The Court reasoned that unless such a requirement were read into the Rule, the Rule would violate the defendant's right to confrontation. The Committee therefore believes that if courts are going to read language into a Rule to protect its constitutionality, it makes sense to write the Rule in compliance with the Constitution in the first place.

The Committee also determined that codifying constitutional doctrine provides a protection for defendants against an inadvertent waiver of the reliability requirements imposed by the Confrontation Clause. A defense counsel might be under the impression that the hearsay exceptions as written comport with the Constitution. Indeed, this is a justifiable assumption for all the categorical hearsay exceptions in the Federal Rules of Evidence, which have been found "firmly rooted" – except for Rule 804(b)(3). A minimally competent defense lawyer might object to a hearsay statement as inadmissible under Rule 804(b)(3), thinking that an additional, more specific objection on constitutional grounds would be unnecessary. If the hearsay exception and the Confrontation Clause are congruent, then the risk of inadvertent waiver of the constitutional reliability requirements would be eliminated. *See, e.g., United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000) (court considers only admissibility under Rule 804(b)(3) because defense counsel never objected to the hearsay on constitutional grounds; yet there is no harm to the defendant because the Circuit requires corroborating circumstances for inculpatory statements against penal interest).

The Evidence Rules Committee also found it notable that a number of the Federal Rules of Evidence are written with

constitutional standards in mind. For example, Rule 412, the rape shield law, provides that evidence of the victim's sexual conduct is admissible if its exclusion "would violate the constitutional rights of the defendant." Rule 803(8)(B) and (C), covering law enforcement reports in criminal cases, contain exclusionary language that is designed to protect the accused's right to confrontation. *See United States v. Oates*, 560 F.2d 45 (2d Cir. 1977) (noting the constitutional basis for that exclusionary language). And Rule 201(g) contains a limitation on judicial notice in criminal cases, in specific deference to the defendant's constitutional right to jury trial. So it is hardly unusual, and indeed it is appropriate, for Evidence Rules to be written in light of constitutional standards.

Because of the concerns over the unconstitutionality of the Rule as presently written, the Committee has proposed a revised amendment to Rule 804(b)(3). That proposed amendment would accomplish at least three important objectives:

1. It would retain the corroborating circumstances requirement as applied to statements against penal interest offered by the accused. The Evidence Rules Committee remains convinced that the corroborating circumstances requirement is necessary to guard against the risk that criminal defendants and their cohorts will manufacture unreliable hearsay statements.

2. It would extend the corroborating circumstances requirement to declarations against penal interest offered in civil cases. This part of the proposal is unchanged from the proposal as originally released for public comment. The Committee notes that at least two federal circuits currently require corroborating circumstances for declarations against penal interest offered in civil cases, even though the text of

the Rule does not impose such a requirement. *See American Automotive Accessories, Inc. v. Fishman*, 175 F.3d 534, 541 (7th Cir. 1999); *McClung v. Wal-Mart Stores, Inc.*, 270 F.3d 1007, 1013-15 (6th Cir. 2001). This part of the proposal would bring the Rule into line with this sensible case law.

3. It would require that statements against penal interest offered against the accused must be “supported by particularized guarantees of trustworthiness.” This language is carefully chosen to track the language used by the Supreme Court in its Confrontation Clause jurisprudence. It would guarantee that the Rule would comport with the Constitution in criminal cases, without imposing on the government any evidentiary requirement that it is not already required to bear.

The proposed revised amendment to Rule 804(b)(3) was approved by all members of the Committee, including the Justice Department representative. The proposed revised amendment and accompanying Committee Note are attached to this Report.

The Committee believes that the proposed revision is a substantial change from the proposed amendment that was released for public comment. The proposal released for public comment was intended to provide symmetry and unitary treatment of declarations against penal interest; “corroborating circumstances” would be required for all such statements. Most of the public comment considered the merits of a symmetrical application of the corroborating circumstances requirement in criminal cases. In contrast, the proposed revision would impose different admissibility requirements depending on the party proffering the declaration against penal interest. The prosecution would be required to show “particularized guarantees of trustworthiness” (i.e., the Confrontation Clause reliability standard), while all other parties would be required

to show “corroborating circumstances” – however that term is interpreted by the courts. Because the revision is a significant change, the Evidence Rules Committee recommends that the revised proposal be released for a new period of public comment.

Recommendation: The Evidence Rules Committee recommends that the revised proposal to amend Evidence Rule 804(b)(3) be approved for release for public comment.

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Attachment[]:

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Proposed Revised Amendment to Evidence Rule 804(b)(3) and Committee Note (recommended for approval for release for public comment).

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